Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1994

TOMMY L. ROBERTSON, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR WRIT OF CERTIORARI

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August 1994

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QUESTION PRESENTED

Whether petitioner was denied effective assistance of counsel, since his counsel abandoned his duties during the post-trial process.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Tommy L. Robertson, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Military Appeals entered in his case on 31 May 1994.

OPINIONS BELOW

The order and judgment of the United States Court of Military Appeals, reported at 39 M.J. 211 (C.M.A. 1994) is located at Appendix A. The decision of the United States Air Force Court of Military Review, reported at 34 M.J. 1206 (A.F.C.M.R. 1992) is located at Appendix B.

JURISDICTION

The final order of the United States Court of Military Appeals was entered on 31 May 1994. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1259(3) (Supp. 1993) and 10 U.S.C.A. § 867(a) (Supp. 1993).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment of the Constitution of the United States provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

At a general court-martial convened at McConnell Air Force Base, Kansas, petitioner was convicted, by a panel of officer members, of wrongful use of cocaine. He was sentenced to a bad conduct discharge, six months confinement, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade.

The Petitioner was represented at trial by a civilian defense counsel, Mr. Howard L. Jenkins, Jr., and by a detailed military counsel, Captain Stanley E. Field. After the president announced the sentence, the judge asked which defense counsel would be handling the post-trial representation, and Mr. Jenkins replied, "At this time, your honor, I will." When the government sought to serve the Staff Judge Advocate's recommendation on both Mr. Jenkins and Captain Field, Captain Field refused to be served. The 10-day period to submit a response (pursant to R.C.M. 1106(f)) and clemency matters (pursuant to R.C.M. 1105) began running in this case upon service of the recommendation to Mr. Jenkins on 28 September 1990, and it expired on 9 October 1990, the first business day after the 10 days elapsed. On 10 October 1990, Mr. Jenkins asked for an extension of 36 days until 15 November 1990. In this request, he stated, "[d]ue to the pressing responsibilities, counsel for the appellant was distracted and his failure to file the response in a timely manner was due to excusable neglect."

Although the convening authority did not have to grant this request, he did grant it, in part, until 17 October 1990. Mr. Jenkins failed to submit any clemency matters, or anything in response to the Staff Judge Advocate's recommendation.

Petitioner did prepare and submit a 17 page handwritten response to the Staff Judge Advocate's recommendation, without the assistance of counsel. Petitioner did not submit any clemency matters. Numerous attempts to contact Mr. Jenkins after the 17 October 1990 deadline and before 25 October 1990 were unsuccessful.

The Air Force Court of Military Review held that petitioner was denied the effective assistance of counsel. The Court stated:

> [T]he civilian defense counsel, who had performed respectably at trial, apparently made no effective efforts to learn about the post-conviction procedures. His request for an extension of time, for example, asked a period greater than that permitted by the statute [R.C.M. 1105(c)(1)], and it is phrased in the language of a civilian's request for permission to file notice of an appeal. Nothing in the record permits us to infer that Sergeant Robertson had the benefit of consultation with competent counsel, and chose, as a matter of strategy, to remain silent. Instead, every indication suggests that this valuable opportunity was lost because the civilian defense counsel didn't know what he was doing.
>
> The detailed military defense counsel appears to have abandoned his client after trial, but we cannot be certain. It is true, for example, that "[a] lawyer may limit the objectives of the representation if the client consents after consultation." However, in military practice, there is a very strong theme that defense

> counsel's representation must continue through the post-trial activities until counsel is succeeded. . . . It appears to us that military counsel quit too soon.

United States v. Robertson, 34 M.J. 1206, 1211 (A.F.C.M.R. 1992). (Citations omitted)

The Court, however, held that the petitioner was not prejudiced by the ineffectiveness, since he did not inform the Court that he instructed his counsel to prepare or submit anything. Also, the matters submitted by the petitioner, without the assistance of counsel, did not raise anything that would have been likely to result in any relief from the convening authority. *Robertson,* 34 M.J. at 1211-1212.

The United States Court of Military Appeals granted review of the decision of the Air Force Court of Military Review. In that opinion, the Court of Military Appeals held that the petitioner did not meet the burden of showing that counsel did not exercise reasonable diligence in submitting post-trial matters for appellant. *United States v. Robertson,* 39 M.J. 211, 218 (CM.A. 1994).

REASON FOR GRANTING THE WRIT

Petitioner's case raises important questions concerning the Sixth Amendment right to counsel in post-trial proceedings. It is axiomatic in military and civilian law that an accused is entitled to effective assistance of counsel throughout the entire trial, post-trial and appellate process.

In *Strickland v. Washington,* 466 U.S. 668 (1984), this Court set out a two-part test to review claims of ineffective assistance of counsel: 1) Whether the counsel's performance was deficient, and 2) Whether the deficient performance prejudiced the defense.

The standard of review is different in a case where an accused has been denied counsel. Actual or constructive denial of assistance of counsel altogether is not subject to the kind of prejudicial analysis that is appropriate in determining whether the quality of a lawyer's performance itself has been constitutionally ineffective. *Perry v. Leche*, 488 U.S. 272 (1989). Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. *Strickland*, at 692.

Another case involving denial of assistance of counsel was *Geders v. United States*, 425 U.S. 80 (1976). In that case, the petitioner testified on his own behalf, and the trial judge recessed for the night before cross-examination. The judge ordered the petitioner not to discuss the case with his attorney during the overnight recess. This Court held that this was a denial of assistance of counsel.

The military courts have addressed the importance of post-trial and clemency submissions. In one case, the defense counsel was late in submitting post-trial matters, and the convening authority did not consider them. The Court of Military Appeals held that the failure to consider the post-trial clemency submission prejudiced accused and justified the return of the trial record to the Judge Advocate General of the Army. *United States v. Spurlin*, 33 M.J. 443 (C.M.A. 1991).

In the case *sub judice*, the facts are more egregious, since the defense counsel never submitted any matters. Mr. Jenkins' failure to submit any post-trial matters demonstrates that the petitioner was not only denied the effective assistance of counsel, but that he was denied assistance of counsel altogether. The record is clear that Mr. Jenkins requested an extension of the deadline to submit post-trial matters. This indicates that the petitioner intended to submit something. In addition, the petitioner's

17 page submission indicates that he wanted the convening authority to at least consider exercising his discretion and granting clemency or some other form of relief. Although the petitioner submitted matters alleging errors at trial, he did not submit any clemency matters.

The Court of Review held that the petitioner was denied the effective assistance of counsel, but that there was no prejudice. The Court also held that the petitioner's own submission, prepared without the assistance of counsel, did not raise anything that was likely to result in any relief from the convening authority. *Robertson,* 34 M.J. at 1211-1212. This reasoning seems circular, since the petitioner's own response should not be expected to be of the caliber that would convince the convening authority to grant relief—that is the purpose of counsel. The petitioner attempted to legally analyze everything at trial that he perceived as error; he was not qualified to do so.

The petitioner also did not submit any clemency matters. Clemency was the means of relief most likely to be granted, especially since the petitioner had 19 years of service. Being just one year away from being retirement eligible, the petitioner was a prime candidate for clemency. If the petitioner had been afforded the assistance of counsel, he would have known that submitting clemency matters was crucial.

> If a convening authority has not seen a convicted servicemember's clemency submission, it is well established that he has not been afforded his best hope for sentence relief.

Spurlin, at 445.

The Court of Military Appeals held that the petitioner had not met his burden of showing that counsel did not exercise reasonable diligence in submitting post-trial matters for appellant. *Robertson,* 39 M.J. at 218. The Court made this ruling without explanation or analysis.

CONCLUSION

A clear understanding of what constitutes ineffective assistance of counsel, denial of counsel, and the difference between the two is crucial to an understanding of the Sixth Amendment right to counsel, as it applies to the post-sentencing process. The resolution of this case will settle the question of whether counsel's abandonment of duties during the post-trial process constitutes ineffective assistance of counsel.

Respectfully submitted,

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August 1994

APPENDIX

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 68,330.
CRM No. 28955.

UNITED STATES, APPELLEE,

v.

TOMMY L. ROBERTSON, TECHNICAL SERGEANT,
U.S. AIR FORCE, APPELLANT.

Argued Oct. 6, 1993.
Decided May 31, 1994.

Accused was convicted by a general court-martial, Gregg H. Reinecke, J., of using cocaine. The United States Air Force Court of Military Review, affirmed, 34 M.J. 1206. Review was granted. The United States Court of Military Appeals, Crawford, J., held that: (1) error in permitting trial counsel to attack credibility of defense witness based on arrest was harmless; (2) testimony regarding accused's character for truthfulness was properly excluded; and (3) accused was not denied posttrial effective assistance of counsel.

Affirmed.

For Appellant: *Captain Ursula P. Moul* (argued); *Colonel Terry J. Woodhouse* (on brief); *Colonel Jay L. Cohen* and *Major Mary C. Yastishock*.

For Appellee; *Captain Timothy G. Buxton* (argued); *Colonel Richard L. Purdon* and *Colonel Jeffrey T. Infelise* (on brief); *Lieutenant Colonel Thomas E. Schlegel, Lieutenant Colonel Brenda J. Hollis, Major Morris D. Davis, Captain David C. Wesley.*

Opinion of the Court

CRAWFORD, Judge:

Contrary to his pleas, appellant was found guilty, by a general court-martial with members, of using cocaine, in violation of Article 112a, Uniform Code of Military Justice, 10 USC § 912a. He was sentenced to a bad-conduct discharge, confinement for 6 months, total forfeitures, and reduction to the lowest enlisted grade. The convening authority approved the sentence, and the Court of Military Review affirmed the findings and sentence. 34 MJ 1206 (1992). We granted review on the following issues:

I

WHETHER THE AIR FORCE COURT OF MILITARY REVIEW ERRED IN HOLDING NO MATERIAL PREJUDICE RESULTED WHEN THE MILITARY JUDGE ALLOWED THE TRIAL COUNSEL, OVER OBJECTION, TO ATTACK THE CREDIBILITY OF MS. MINTER BASED ON HER ARREST FOR CONSPIRACY TO COMMIT FRAUD.

II

WHETHER THE AIR FORCE COURT OF MILITARY REVIEW ERRED IN HOLDING NO MATERIAL PREJUDICE RESULTED WHEN THE MILITARY JUDGE DID NOT ALLOW A DEFENSE WITNESS TO TESTIFY THAT APPELLANT WAS LAW-ABIDING.

III

WHETHER THE AIR FORCE COURT OF MILITARY REVIEW ERRED IN HOLDING NO MATERIAL PREJUDICE RESULTED WHEN THE APPELLANT WAS DENIED POST-TRIAL EFFECTIVE ASSISTANCE OF COUNSEL.

For the reasons set forth herein, we affirm.

FACTS

Appellant tested positive for cocaine as the result of a lawful mandatory urinalysis drug test. His defense was innocent ingestion. His roommate, Ms. Minter, a recovering drug addict, testified that several days before appellant's urinalysis test, she had visited a park where she drank beer and purchased almost a gram of cocaine. When the police started to close down the park, she put the cocaine in her beer to avoid being caught with it and drank about half of the beer on her way home. At home she placed the beer on the coffee table and went to the bathroom. When she returned, the beer was gone, and she assumed that appellant had taken it. Appellant testified that he drank the beer, not knowing that it was laced with cocaine.

Dr. Wallace, a government expert witness who testified as to the laboratory report, indicated that the accused's urine showed 628 nanograms of cacaine. Dr. Wallace opined that, even if appellant had ingested the entire amount of cocaine purchased by Ms. Minter in the park and dumped into her can of beer, statistical projections indicated that only 50 to 150 nanograms of cocaine metabolite would be present in appellant's urine 66 hours later. Dr. Wallace further opined that the accused would have had to ingest a "near fatal" amount of cocaine for 628 nanograms of the metabolite to have been present 66 hours later.

Issue I

[1, 2] At trial, trial counsel asked Ms. Minter on cross-examination:

Q. Now, you've had some problems with honesty before, haven't you, Miss Minter?

A. No.

Q. Do you remember back in September of '84, having some problems—you were arrested for conspiracy to commit fraud, and attempted burglary?

A. Id' rather—I plead the Fifth on that. I don't want to have anything—answer anything about my past that doesn't have anything to do with this case.

After a motion to strike her testimony, the military judge convened a session under Article 39(a), UCMJ, 10 USC § 839(a), without the members present. At this session the prosecutor argued that both conspiracy to commit fraud and attempted burglary were "directly [related] to her character for truthfulness." He also indicated there was a "good-faith basis" for the question because it was based upon an FBI report, although he did noy know the underlying facts.

Civilian defense counsel argued that a mere arrest not amounting to a conviction could not be used for impeachment purposes. Defense counsel also argued that the evidence was inadmissible under Mil.R.Evid. 404(b), Manual for Courts-Martial, United States, 1984.[1] The judge overruled defense counsel's objection.

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[1] Evidence admissible under Mil.R.Evid. 404(b), Manual for Court-Martial, United States, 1984, is admissible as substantive evidence on the merits, whereas evidence admissible under Mil.R.Evid. 608(b) is only admissible to determine the credibility of the witness. Likewise, Mil.R.Evil. 608(b) prohibits proving the act by extrinsic evidence, whereas under Mil.R.Evid. 404(b), the cross-examiner need not "take the answer" the witness gives concerning Ml.R.Evil. 404(b) matters since extrinsic evidence is admissible.

When the court members reconvened, the prosecutor renewed and emphasized his question and asked Ms. Minter:

> I was asking a line of questions about, if you had problems in the past with honesty or truthfulness, and you said no. And I asked you if you didn't think that having been arrested in September of 1984 for conspiracy to commit fraud would be something involving honesty and truthfulness. I ask you that again?

She replied, "No." Trial counsel accepted this answer without follow-up questions.

The court below determined that "[a]n arrest *is governmental conduct*, not conduct of the witness." Therefore, they found error in using an arrest for impeachment purposes but found the error to be harmless. *Id.* at 1208. In *United States v. Toro*, 37 MJ 313, 315 (CMA 1993), we said, "There are three evidentiary stages which concern the credibility of witnesses at trial: bolstering, impeachment, and rehabilitation."

Issue I concerns the impeachment stage. There are numerous methods of impeachment, including use of specific instances of misconduct,prior convictions, contradition, inconsistent statements, inconsistent acts, bias, and deficiencies in the elements of competency. *Id.* at 315. The method at issue here is impeachment by specific instances of conduct – in this case an arrest for conspiracy to commit fraud and attempted burglary. Mil.R.Evid. 608(b), which is substantially the same as Fed.R.Evil. 608(b), provides:

> Specific instances of conduct of a witness, for the purpose of attacking or supporting the credibility of the witness, other than conviction of crime as provided in Mil.R.Evid. 609, *may not be proved by extinsic evidence.* They may, however, in the discretion

> of the military judge, *if probative of truthfulness or untruthfulness,* be inquired into on cross-examination of the witness (1) concerning character of the witness for truthfulness or untruthfulness. . . .

(Emphasis added.) Impeachment under Mil.R.Evid. 608(b) and Fed.R.Evid. 608(b) may not be based merely upon any instance of misconduct but, rather, upon conduct that relates to untruthfulness.[2]

[3, 4] In order to have proper cross-examination as to misconduct relating to untruthfulness: (1) there must be a good-faith belief by the opponent that the conduct occurred; and (2) the conduct must relate to instances of untruthfulness. *Cf. Michelson v. United States*, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948). As to (1), a rap sheet from a law enforcement agency, in this case the FBI, can furnish the good-faith belief that conduct occurred if it details the underlying facts for the arrest. *People v. Williams*, 228 Cal.App.3d 146, 152, 278 Cal.Rptr. 801, 804 (1991). A prosecutor who is not using a detailed rap sheet or is not acting in good faith can be called to the witness stand at an Article 39(a) session to furnish the basis for his information. *See United States v. Cardarella*, 570 F.2d 264, 268 (8th Cir.1978), *cert. denied,* 435 U.S. 997 , 98 S.Ct. 1651, 56 L.Ed.2d 87 (1978). The problem in this case was that the rap sheet did not recite the underlying facts for the arrest. Further trial counsel told the military judge he did not know the underlying facts but only that Ms. Minter was arrested for conspiracy to commit fraud and attempted burglary. It is difficult for us to hold that trial counsel had a good-faith belief that Ms. Minter participated in the alleged crimes when trial counsel did not know the underlying facts of the arrest.

[5] As to (2) and as the Court of Military review implied, an arrest alone without showing the underlying cir-

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[4] In my personal riew, there are different degrees of probativeness relating to truthfulness starting with a lie, statement of an informant as to misconduct, an arrest, and a conviction.

cumstances is not probative of cedibility. 34 MJ at 1208. *See also Michelson v. United States,* 335 U.S. at 482, 69 S.Ct. at 221; 3A Wigmore, *Evidence* § 980a at 835-36 (Chadbourn rev.1970). The questioner must demonstrate that the arrest was based on acts affecting credibility, *United States v. Amahia,* 825 F.2d 177, 181 (8th Cir.1987), or the arrest record impeaches a witness' assertion that the arrestee enjoys a reputation as a law-abiding person, *Michelson v. United States*, 335 U.S. at 483-84, 69 S.Ct. at 222, or that the arrest shows prior untruthful statements by a testifying defendant, *United States v. Farias-Farias,* 925 F.2d 805, 809-11 (5th Cir.1991).

Mil.R.Evil. 608(b) does not define what acts relate to truthfulness or untruthfulness. However, Mil.R.Evid. 609(a)(2) speaks in terms of "dishonesty or false statement." As to what has a bearing on truthfulness, this Court stated in *United States v. Weaver,* 1 MJ 111, 118 n. 6 (1975), the following:

> Acts of perjury, subornation of perjury, false statement, or criminal fraud, embezzlement or false pretense are, for example, generally regarded as conduct reflecting adversely on an accused's honesty and integrity. Acts of violence or crimes purely military in nature, on the other hand, generally have little or no direct bearing on honesty and integrity.

[6] Likewise, in *United States v. Leake,* 642 F.2d 715, 719 (4th Cir.1981), the Court held it was improper for the trial judge to preclude the defense from cross-examining the key witness about defrauding an innkeeper and failure to repay loans. These offenses involved instances of untruthfulness. *See also United States v. Owens*, 21 MJ 117, 123 (CMA 1985) (court permitted cross-examination of appellant about "international falsehood under oath" in a warrant-officer application); *United States v. Page*, 808 F.2d 723, 730 (10th Cir.1987) (including within

Fed.R.Evil. 608(b) would be forgery, uttering forged instruments, bribery, suppression of evidence, false pretense, cheating, and embezzlement), *cert. denied,* 482 U.S. 918, 107 S.Ct. 3195, 96 L.Ed.2d 683 (1987), disapproved *sub nom. United States v. Williams,* ____ U.S. ____, ____, ____, 112 S.Ct. 1735, 1737, 1746, 118 L.Ed.2d 352 (1992); *United States v. Amahia,* 825 F.2d at 181 ("Rule 608(b) will permit inquiry into the specific acts which may have led to an arrest if those acts related to *crimen falsi, e.g.,* perjury, subornation or perjury, false statement, embezzlement, false pretenses"); *United States v. Beros,* 833 F.2d 455, 463 (fld Cir.1987) (lying on marriage license). *Cf. United States v. Newman,* 849 F.2d 156, 161 (5th Cir.1988) (failure to reveal possible arrest for shoplifting and misdemeaner arrest for theft/destruction of private property does not violate *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) because they may not be used for impeachment). Thus, the key to the impeachment question is not the fact of the arrest itself but, instead, whether the underlying facts of the arrest relate to truthfulness or untruthfulness. The record of appellant's trial does not reveal the underlying facts of the conspiracy to commit fraud or the attempted burglary. Obviously, there are various degrees of offenses. We do not know whether the conspiracy to commit fraud was based upon an allegation that the witness signed her spouse's income tax return wherein they took an improper deduction of $25.00 or whether it was based upon something more. We also do not know how far the witness had allegedly gone to commit attempted burglary. Thus, we are unable to determine whether those offenses relate to untruthfulness.

[7-9] Even where there has been a proper showing of the underlying circumstances there are still some limitations on impeachment by instances of conduct. For example,

if the witness denies the conduct, it "may not be proved by extrinsic evidence." Mil.R.Evid. 608(b). This is unlike impeachment by prior convictions which may be proven through a third party or through appropriate documents. Additionally, the judge has the discretion to require counsel to ask only about the underlying conduct without mentioning the term "arrest." Mil.R.Evid. 403. The judge may also exercise discretion and exclude the testimony altogether, depending on the importance or lack of importance of the testimony, the age of the conduct, the relationship of the misconduct to truthfulness or untruthfulness, wether the matter would lead to a time-consuming and distracting explanation on cross-examination or recross-examination and undue prejudice. *Cf. United States v. Frazier,* 14 MJ 772, 779 (ACMR 1982), *pet. denied,* 16 MJ 93 (1983).

We hold that the prosecutor met neither prong of the two-prong test for impeachment by specific instances of conduct under Mil.R.Evid. 608(b). Because he did not know the underlying facts, trial counsel was unable to relate them to Ms. Minter's untruthfulness. We hold the questioning of Ms. Minter about her prior arrest was error. Under the facts of this case, however, we agree with the Court of Military Review that the error was harmless.

Issue II

[10] While Issue I concerned impeachment of the witness' credibility, this issue concerns bolstering a witness' credibility by introducing reputation evidence or opinion evidence as to truthfulness and the interrelationship with the character-evidence rules.

The defense called Mrs. McCullough as a character witness. She was a friend of the accused and his landlady at the time of trial. She knew him for 2 years and had

shared a residence with appellant for 3 months. After establishing that Mrs. McCullough had known appellant for 2 years, defense counsel asked, "Have you had the opportunity to ever see or hear about Sergeant Robertson ever using any type of drugs?" After a government objection, the defense made an offer of proof that the purpose of the question was to establish "that the defendant is against the use of drugs." The judge sustained the objection and asked counsel to reword the question. The defense rephrased the question asking, during the time you've known him, "how would you describe your relationship with him?" Mrs. McCullough responded, and the following colloquy ensued:

> As good friends. I don't—you know, I lived, I was living by myself when we was neighbors, and he would take time with my grandkids, or if I needed a ride to the grocery store or to the laundry, or something like that, you know he would take time out and do this for me. And my son was there staying with me, and he was on drugs, and he was stealing from me, and you know, I was going through problems, and I would sit and talk to him about it. And even though he was so dead-set against people on drugs—
>
> TC: We renew our objection, your honor.
>
> MJ: Objection sustained. Members, disregard that tesitmony as to specific instances of conduct. Mr. Jenkins, lay the foundation and elicit either opinion, or testimony as to the accused's reputation for a pertinent character trait.
>
> * * *
>
> [CDC]: Mrs. McCullough, do you have an opinion as to the defendant's character and honesty in the community?

A: Well, like I said, he lives with me now, and he goes to church with me, and I know I can speak for while he's living with me, because, you know, he goes to church with me, and everything, and he doesn't do anything there.

CDC: Just a moment, your honor.

Q: What is your opinion of his character?

TC: Your honor, what character trait?

MJ: Mr. Jenkins, what character trait are we asking about?

CDC: How do you describe his character as far as honesty?

TC: Your honor, the accused hasn't placed his character for honesty in issue, because he hasn't taken the stand.

MJ: Mr. Jenkins, what's your response to that?

CDC: Your honor, I think the defendant's honesty is in question because his credibility, as well as whether or not he ingested cocaine back on, or at least had cocaine in his system back on April 18th, 1990, whether or not he did knowingly. I would suggest to this court that his honesty is in question, as to whether or not he's telling the truth.

MJ: Well, the government objection is sustained. His character for honesty and veracity hasn't been placed in issue because he hasn't testified.

CDC: I agree with that.

MJ: At this point in time it's not a pertinent character trait.

CDC: Okay, your honor. Those are all the questions I have at this time, your honor.

[11] There are three character-evidence rules that comes into play: Mil.R.Evid. 608(a); [3] Mil.R.Evil. 404(a); [4] and Mil.R.Evil. 405(a).[5] Mil.R.Evid. 608(a) addresses bolstering or impeaching with opinion and reputation-type evidence of truthfulness or untruthfulness. Mil.R.Evid. 404(a) and 405(a) deal with introduction of character evidence on the merits. As to admissibility of evidence to prove the accused's character, the key is held by the accused. The prosecution may not in the first instance introduce this kind of evidence, not because it is irrelevant but because it may be too prejudicial. *Michelson v. United*

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[3] Mil.R.Evil. 608(a) provides:

Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness had been attacked by opinion or reputation evidence or otherwise.

[4] Mil.R.Evid. 404(a) provides:

Character evidence generally. Evidence of a person's character or a trait of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:
(1) Character of the accused. Evidence of a pertinent trait of the character of the accused offered by an accused, or by the prosecution to rebut the same. . . .

[5] Mil.R.Evid. 405(a) provides:

Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination inquiry is allowable into relevant specific instances of conduct.

States, 335 U.S. at 475-76, 69 S.Ct. at 218-19.[6]

The Court of Military Review interpreted the witness' testimony that "he was so deadset against people on drugs" as "analogous to 'law-abiding-ness.' " The court found:

> [We] are confident that the witness would have testified that she believed Sergeant Robertson to be intolerant of drug abuse and abusers. That trait of character would have been relevant as tending to make more probable the defense theory that his ingestion was innocent. We will assume that the inquiry should have been permitted.

34 MJ at 1209. However, the burden is upon the proponent to set forth or make an offer of proof of his or her evidence. Mil.R.Evid. 103(a)(2). Here the judge specifically asked defense counsel to lay a proper foundation for Mrs. McCullough's opinion of appellant's reputation, but defense counsel failed to do so. In order to be admitted on the merits, character evidence must relate to a "pertinent [character] trait." Mil.R.Evid. 404(a). The judge asked

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[6] "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be presuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair and undue prejudice." (Footnotes and citation omitted.)

what character trait civilian defense counsel was seeking to prove by Mrs. McCullough's testimony; counsel asserted it was "character as far as honesty." The judge responded that this would not be admissible because appellant's character for honesty had not yet been placed in issue because appellant had not testified. Counsel neither sought to have Mrs. McCullough's testimony introduced to prove what was at issue nor to recall her following appellant's testimony or ask for conditional admission of the evidence based on appellant's anticipated testimony.

Based on the responses from defense counsel, we hold that the judge did not err in precluding testimony as to the accused's honesty.

Issue III

[12] At trial civilian defense counsel indicated that he would represent the accused concerning the staff judge advocate (SJA)'s post-trial recommendation. After the statutory 10-day response period had expired, defense counsel asked for approximately a 36-day delay to respond to the SJA's post-trial recommendations. This was denied, but defense counsel was granted an 8-day delay. In the meantime appellant filed a 17-page handwritten personal commentary on his trial. Civilian defense counsel never filed a document.

[13, 14] Military defendants are entitled to the effective assistance of counsel during the post-trial appellate processes. *United States v. palenius,* 2 MJ 86 (CMA 1977). After trial, when there is representation by civilian counsel, it is advisable for the military judge, as was done in this case, to determine on the record who will represent appellant.

In determining whether this counsel was effective we apply the two-prong *Strickland v. Washington,* 466 U.S.

668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) standard: (1) whether counsel was reasonably competent and (2) if not, whether the accused was prejudiced. *See also Lockhart v. Fretwell,* ____ U.S. ____, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993); *United States v. Scott,* 24 MJ 186 (CMA 1987).

[15] There are various post-trial responsibilities of defense counsel during the four levels of post-trial review. There are two mandatory reviews, first by the convening authority and second by the Court of Military review. The third review is, in most cases, by a discretionary appeal to the United States Court of Military Appeals. Finally, if the case is decided by our Court, then the fourth review is by a writ or a discretionary appeal to the United States Supreme Court.

As to the first review, the one at issue here, there are numerous actions appellant's counsel can take. Counsel may petition for deferment of confinement, respond to the SJA's recommendation, or even assist appellant in putting family affairs in order. Regardless of indigency, an appellant whose sentence included a punitive discharge is entitled to a verbatim record of trial. Art. 54, UCMJ, 10 USC § 854. This record of trial is to be served on the defense, along with the SJA's recommendation. Certainly there is a denial of effective assistance of counsel when counsel is not "conflict free." *United States v. Leaver,* 36 MJ 133 (CMA 1992).

Under the facts of this case, we hold that appellant has not met his burden of showing that counsel did not exercise reasonable diligence in submitting post-trial matters for appellant. Based on the presumption of competence set forth in *Strickland, see* 466 U.S. at 689, 104 S.Ct. at 2065, appellant has the burden of showing that his counsel was deficient and that the deficiency prejudiced him, *see id.* Appellant has not carried that burden.

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges COX, GIERKE, and WISS concur.

U.S. AIR FORCE
COURT OF MILITARY REVIEW

ACM 28955.

UNITED STATES, APPELLEE,

v.

TOMMY L. ROBERTSON, TECHNICAL SERGEANT,
FR449-84-6693, U.S. AIR FORCE, APPELLANT.

Sentence Adjudged 29 Aug. 1990.
Decided 11 June 1992.

Accused was convicted by a general court-martial, Gregg H. Reinecke, J., of having using cocaine. Accused appealed. The United States Air Force Court of Military Review, James, J., held that: (1) error in permitting impeachment of defense witness by witness' prior arrest was not prejudicial; (2) assuming that defense counsel should have been permitted to question witness regarding accused's character, there was no prejudice; and (3) failure of defense counsel to give effective posttrial representation did not prejudice accused.

Affirmed.

Appellate Counsel for the Appellant: Colonel Jeffrey R. Owens and Major Bernard E. Doyle, Jr.

Appellate Counsel for the United States: Colonel William R. Dugan, Jr., Lieutenant Colonel Brenda J. Hollis, Major Paul H. Blackwell, Jr., and Major Morris D. Davis.

Before LEONARD, RIVES, and JAMES, Appellate Military Judges.

OPINION OF THE COURT

JAMES, Judge:

Technical Sergeant Robertson was convicted of having used cocaine.[1] On review he appeals two rulings on evidence, the instructions on findings, and the effectiveness of the post-trial representation he received. We find errors but not prejudice, and we affirm.[2]

I. Impeachment By Arrest

[1] Sergeant Robertson called his female housemate (a platonic friend) to establish his defense that his ingestion of cocaine was innocent, without knowledge and unintentional. She admited to having been a user of cocaine. According to her, she bought for herself the cocaine that Sergeant Robertson eventually ingested, panicked at the sight of police, and poured it all into a can of beer that she had. She said that she went home with the beer, left it unattended, and that Sergeant Robertson drank the beer, not knowing what was in it. Trial counsel sought to impeach her:

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[1] Article 112a, UCMJ, 10 U.S.C. § 912a (1988). Sergeant Robertson was sentenced by the general court-martial, composed of members, to be discharged from the service with a bad-conduct discharge, to be confined for 6 months, to forfeit all pay and allowances for 6 months, and to be reduced to E-1. The sentence was approved as adjudged.

[2] Sergeant Robertson also invites our attention to the denial of a challenge for cause. We find no abuse of discretion. *See United States v. Jobson*, 31 M.J. 117, 122 (C.M.A.1990).

TC: Now, you've had some problems with honesty before, haven't you . . .?

Wit: No.

TC: Do you remember back in September of '84, having some problems—you were arrested for conspiracy to commit fraud, and attempted burglary?

Wit: I'd rather—I plead the Fifth on that. I don't want to have anything—answer anything about my past that doesn't have anything to do with this case.

TC: Motion to strike this witness' testimony.

The motion to strike led to discussion of the admissibility of the answer sought. Trial counsel maintained (as we understand his remarks) that the arrest was evidence of "some problems with honesty" and would show that the witness' denial was false. Accordingly, trial counsel denied any intent to impeach under Mil.R.Evid. 609 by showing a prior conviction. In his view, the prior *arrest* was evidence of a specific instance of conduct by the witness into which he was permitted to inquire under Mil.R.Evid. 608(b). Of course, just as the defense counsel noted, the *arrest* is not an instance of conduct by the witness; it is conduct by the authorities.[3] The defense entered a specific objection

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[3] Apparently trial counsel, Captain J. Bryan Howell, never grasped the significance of the distinction. He had no evidence of a conviction or of the underlying conduct by the witness, if any. When asked whether he did, he twice referred to the process as a game, once saying, "If we're going to play these stupid little games, we can do it the whole schmear." We do not regard the application of the President's rules of evidence to events at a felony trial as games of any sort. However, we recall the stresses of trials, and we notice that neither the ABA Model Rules of Professional Conduct, rule 3.5 and commentary, nor its corollary, Air Force Rules of Professional Responsibility, rule 3.5 (4 December 1989), include such unfortunate phraseology as misconduct. Nonetheless, Captain Howell's remarks added nothing to his argument and detracted from the dignity of this trial. *See also*

during the discussion, belatedly but nonetheless timely enough to preserve the issue. *See* Mil.R.Evid. 103(a). The military judge overruled the objection. The question was posed anew, and the witness answered:

> TC: . . . I asked you if you didn't think that having been arrested in September of 1984 for conspiracy to commit fraud would be something involving honesty and truthfulness. I ask you that again?
>
> Wit: No.

[2] Now, in the peaceful and orderly review of the transcript on appeal, it is clear that the objection should have been sustained, and it was error to permit the question.[4] An arrest is *governmental* conduct, not conduct

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Air Force Regulation 111-1, "Military Justice Guide," para. 12-16 (30 September 1988).

Mere seconds later, Captain Howell sought to impeach the same witness by showing that her testimony was inconsistent with a statement she made earlier to police. He unnecessarily asked her whether she recalled telling the officer that Robertson "has slapped her," too. The defense moved in limine to foreclose any further such revelations, and the military judge asked for trial counsel's comments on the motion:

> MJ: [Summing up] Okay, so you want to restrict the government. Trial counsel, what's your response?
>
> TC: Well, why don't we just let them ask my questions for me?

Taking the reply in context, without the benefit of inflection, we give Captain Howell the benefit of the doubt and assume that his rhetorical question was simply a forensic device to emphasize his disagreement with the defense motion, which he then stated. Even so, it was in poor taste and uncivil. Military Judges must intervene to assure that trials are conducted by the professional members of courts-martial with the dignity that our tradition deserves. R.C.M. 801(a)(2), (3).

[4] Trial counsel's subtle change, soliciting agreement that such an arrest would affect trustworthiness, is transparent and does not affect our view.

of the witness, and it says nothing about the witness' credibility.[5] The extent to which a witness may be impeached is within the discretion of the trial judge, *United States v. Tyler,* 26 M.J. 680, 681-82 (A.F.C.M.R.1988), *aff'd,* 28 M.J. 253 (C.M.A.1989), *cert. denied,* 493 U.S. 814, 110 S.Ct. 62, 107 L.Ed.2d 29 (1989), and the same standard applies to methods of impeachment, *see United States v. Brenizer,* 20 M.J. 78 (C.M.A.1985). The logical connection between credibility and an arrest is so distant that we hold that it is an abuse of discretion to permit a witness to be impeached by evidence of a mere arrest or, in military parlance, apprehension.

[3] Having found error, we must determine whether any material prejudice to a substantial right resulted. Article 59(a), UCMJ, 10 U.S.C. § 859(a) (1988). We conclude that it did not. First, the witness answered the question and denied the embedded assertion. Thus, if we trust court members at all to discriminate between counsels' questions an witnesses' answers, we must conclude that any error in permitting the question was nullified by the answer. Second, we note that this witness' credibilty was limited by other aspects of the case. She confessed to having been a frequent abuser of drugs and alcohol. She was accused of

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[5] The underlying conduct of the witness might have, but trial counsel was apparently unable to address it. *Cf. United States v. Wilson,* 12 M.J. 652, 653 (A.C.M.R.1981) ("The Article 15 [punishment imposed for the underlying misconduct] . . . represents an accusation of misconduct and a determination by the commanding officer that the misconduct occurred even when it may not in fact have taken place. . . ."). Both the distinction between arrest and misconduct and the inappropriateness of impeachment by arrest are discussed well at IIIA J. Wigmore, *Wigmore on Evidence* § 980a (Chadbourn rev. 1970). Of course, a *conviction* does say something about a witness. That is why Mil.R.Evid. 609 exists. We find facetious trial counsel's theory that he might do under Mil.R.Evid. 608 what he obviously was unprepared to do under Mil.R.Evid. 609.

having often taken Sergeant Robertson's car without permission, and he wanted her to move out of the house in which they resided together because of her behavior. She does not appear from the record—ignoring the prior arrest—to be a person of pure character. Instead, her testimony needed help to be credible. As we see below, the converse happened: Other, internal defects in the defense case detracted from its credibility. This error was harmless.

II. Character for Truthfulness

[4] Sergeant Robertson called another resident of the house in which he lived, and she was asked about his character:

> DC: Have you had the opportunity to ever see or hear about Sergeant Robertson ever using any type of drugs?

Trial counsel objected that the inquiry sought to prove chracter by specific acts and that it did not focus on a trait of character in controversy, both in violation of Mil.R.Evid. 405(a). The military judge sustained the objection and invited the defense to rephrase, and it did, first eliciting the witness' relationship with Sergeant Robertson. In the course of her reply, the witness volunteered:

> Wit: . . . . And even though he was so deadset against people on drugs—
>
> TC: We renew our objection, your honor.
>
> MJ: Objection sustained. Members, disregard that testimony as to specific instances of conduct. [Defense counsel], lay the foundation and elicit another opinion, or testimony as to the accused's reputation for a pertinent character trait.

The defense then turned from Sergeant Robertson's attitude about insobriety to his character for honesty. That inquiry was properly foreclosed without objection because he had not yet testified.

On appeal Sergeant Robertson argues by analogy to decisions that hold admissible one's good military character and character for the trait of being law-abiding. *See United States v. Hurtt,* 22 M.J. 134 (C.M.A.1986) (good military character admissible in NCO's trial for drug offenses); *United States v. Clemons,* 16 M.J. 44 (C.M.A.1983) (good military character admissible when accused, charge of quarters, sought to teach subordinates a lesson). *See generally United States v. Wilson,* 28 M.J. 48, 49 n. 1 (C.M.A.1989) (collects cases). Nothing resembling good military character is involved here, but the testimony sought, volunteered, and excluded is analogous to "law-abiding-ness." We can tell only a little of what would have been elicited, *cf.* Mil.R.Evid. 103(a)(2), but we are confident that the witness would have testified that she believed Sergeant Robertson to be intolerant of drug abuse and abusers. That trait of character would have been relevant as tending to make more probable the defense theory that his ingestion was innocent. We will assume that the inquiry should have been permitted.

We still find no harm. Article 59(a), UCMJ, 10 U.S.C. § 859(a)(1988). Our conclusion results from the four-factor analysis in *United States v. Weeks,* 20 M.J. 22, 25 (C.M.A.1985). The evidence did put Sergeant Robertson's credibility, "law-abiding-ness," and sobriety in contest, but one witness's opinion would not have tipped the scales; the contest was settled by inconsistencies in Sergeant Robertson's own account and by the inconsistency of his version with the science explained by the prosecution's toxicologist. A little bolstering of Sergeant Robertson's

credibility would have been nice, but it would never have made the difference. Thus, while the prosecution's case was not conclusive, it was strong, and the defense theory was enfeebled by its internal defects. Even though there was no substitute for the excluded testimony, its quality was hardly pivotal. Accordingly, relief is not warranted.

III. The Instructions

[5] Sergeant Robertson contends that the military judge's instructions to the members on how to deal with permissible inferences of wrongfulness were flawed. Perhaps they were, but any error in those instructions was waived by the failure of the accused to assert it below or to propose alternative instructions. R.C.M. 920(f); *United States v. Smith,* 34 M.J. 200 (C.M.A.1992) (decided recently, well after this case was briefed). We have compared the posture of this case and the instructions in it to those in *Smith,* and we find them to be virtually identical. Accordingly, there is no plain error here that would excuse the appellant from the consequences of his waiver. *Id.*

IV. Post-Trial Representation

[6] Finally, Sergeant Robertson asserts that he was denied his Sixth Amendment right to counsel because he did not have the effective assistance of counsel's representation after trial. We agree, but we find no prejudicial effect.

The results of a court-martial are examined by the commander who convened the court-martial, and that commander has the responsibility for acting on the sentence, approving it as adjudged, reducing it, or disapproving it altogether. Article 60, UCMJ, 10 U.S.C. § 860 (1988); R.C.M. 1107. The accused may submit "matters for consideration" to the convening authority, which typically ask

clemency but may also include claims of legal error. Article 60(b), UCMJ, 10 U.S.C. § 860(b) (1988); R.C.M. 1105. Furthermore, the commander has the recommendations of his staff judge advocate, and the accused is entitled to comment on those recommendations. R.C.M. 1106(f). The accused has (in this case) 10 days from the service of the record of trial or of the recommendations (whichever is later) in which to reply, and the commander may, for good cause shown, extend the period for 20 days. Article 60(b), UCMJ, 10 U.S.C. § 860(b) (1988); R..M. 1105(c)(1), 1106(f)(5).

During trial the military judge asked which defense counsel would be handling the post-trial representation, and the civilian defense counsel replied, "At this time, your honor, I will." When the government sought to serve the recommendations on both the civilian and the detailed military defense counsel, the military lawyer refused to be served.[6] The 10-day period began running in this case upon service of the recommendations upon the civilian defense counsel on 28 September 1990, and it would have expired on 9 October 1990, the first business day after the 10 days elapsed. Defense counsell asked an extension of about 36 days until 15 November 1990. The request was granted in part, giving counsel until 17 October. During the period, Sergeant Robertson filed 17 pages of comments on the trial, to which the staff judge advocate replied in his addendum, *see* R.C.M. 1106(d)(4), but the

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[6] We do not understand such a reaction. The agreements between co-counsel delineating who will do what do not relieve either from vulnerability to service of notices required by law. While R.C.M. 1106(f)(2) sets an order in which the required service must be sought, it does not prohibit the government's effort to serve all counsel. Such an effort to do more than is required is commendable. While the unnecessary service might have no legal consequence, it helps assue that the accused is best helped by his counsel.

defense counsel never filed anything.[7] Though Sergeant Robertson signed the universal request for appellate representation, no one assigned any errors in the space provided on that form.[8]

[7] There is no doubt that the right to effective assistance of counsel continues after trial. *See, e.g., United States v. Calderson,* 34 M.J. 501 (A.F.C.M.R.1991). Civilian counsel need not be competent in every aspect of military criminal law before they accept a client whose case will be tried by a court-martial: "A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question." ABA Model Rules of Professional Conduct, commentary accompanying rule 1.1 (1983). Nevertheless, it is apparent to us that the defense counsel in this case failed to provide competent post-trial representation. *See also id.,* rule 1.3 (diligence).

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[7] There are papers filed with the record after it was received at the Office of The Judge Advocate General but not moved by either party on appeal. Accordingly, we have not regarded them as part of this record, and we have not considered them. Were we to consider them, they would explain that the staff judge advocate's reply to the request for an extension was received at civilian defense counsel's office but filed by his secretary, who did not bring it to his attention. He maintains that he thought all was well, but such a posture is inconsistent with the notice provided to him by Article 60, UCMJ, 10 U.S.C. § 860 (1988); R.C.M. 1105(c)(1), 1106(f)(5), and the written advice to Sergeant Robertson dated 29 August 1990 and on which the civilian defense counsel was listed as an intended recipient of an information copy.

[8] Regretably, the large space provided for that purpose rarely has any entries.

Instead, the civilian defense counsel, who had performed respectably at trial, apparently made no effective efforts to learn about the post-conviction procedures. His request for an extension of time, for example, asked a period greater than that permitted by the statute, and it is phrased in the language of a civilian's request for permission to file notice of an appeal. Nothing in the record permits us to infer that Sergeant Robertson had the benefit of consultation with competent counsel and chose, as a matter of strategy, to remain silent. Instead, every indication suggests that this valuable opportunity was lost because the civilian defense counsel didn't know what he was doing.

The detailed military defense counsel appears to have abandoned his client after trial, but we cannot be certain. It is true, for example, that "[a] lawyer may limit the objectives of the representation if the client consents after consultation." Air Force Rules of Professional Responsibility, rule 1.2(c) (4 December 1989); *accord,* ABA Model Rules of Professional Conduct, rule 1.2(c) (1983). However, in military practice there is a very strong theme that defense counsel's representation must continue through the post-trial activities until counsel is succeeded. *See, e.g., United States v. Palenius,* 2 M.. 86, 92-93 (C.M.A.1977) ("fragmented, noncontinuous representation," "maintain the attorney-client relationship . . . until . . . appellate counsel have been designated and have commenced the performance of their duties"). It appears to us that military defense counsel quit too soon. At the very minimum, he should have assured that the civilian defense counsel was acquainted with the procedure and aware of the time limits for the post-trial submissions and responses.

We need not reach any conclusions of fact or law about military counsel's perfrmance to dispose of this case, for it

is clear that Sergeant Robertson did not get the representation to which he was entitled after trial. This situation did not become clear to the staff judge advocate and convening authority until after action had been taken. After that point, it became impossible for the convening authority to fix the problem without our intervention. *See* R.C.. 1107(g).

Accordingly, we hold that the failure of the defense counsel to give timely assistance to Sergeant Robertson in the preparation of his post-trial submissions to the convening authority under Article 60 constituted ineffective assistance of counsel. However, the inquiry does not end there. As we discussed in *Calderon,* 34 M.J. at 504-505, we must examine the events to see whether there was any prejudicial effect.

[8] An appellant who complains of ineffective assistance bears the burden of showing that the ineffectiveness prejudiced him. *See generally United States v. Barnard,* 32 M.J. 530 (A.F.C.M.R.1990), *pet. denied,* 33 M.J. 484 (C.M.A.1991). Despite the present assistance of appellate counsel, Sergeant Robertson has not brought to our attention what other matters he would have submitted to the convening authority, had he been helped as he should have been. *Cf. United States v. Curry,* 31 M.J. 359, 376-77 (C.M.A.1990); *United States v. Rogers,* 21 M.J. 435, 437, 439 (C.M.A.1986); *United States v. Smart,* 21 M.J. 15, 18 (C.M.A.1985); *Calderon,* 34 M.J. at 504. He has not informed us that he instructed his counsel to prepare or submit anything. *Cf. Curry,* 31 M.J. at 376-77. We have examined the matters that Sergeant Robertson submitted, and they raise nothing which would have been likely to result in any relief from the convening authority. *Cf. United States v. Reddick,* 32 M.J. 967, 968 (A.C.M.R.1991), *pet. denied,* 34 M.J. 68 (C.M.A.1991). We have also examined the entire record for legal error,

factual sufficiency, and matters affecting the appropriateness of the sentence, as we always must, Article 66(c) UCMJ, 10 U.S.C. § 866(c) (1988), and we found nothing which we think would have warranted any relief had they been brought to the convening authority's attention. Accordingly, we conclude that Sergeant Robertson has not sustained his burden of showing that the ineffectiveness of counsel had any prejudicial effect. No relief is warranted.

The findings of guilty and the sentence are correct in law and fact and, on the basis of the entire record, are

AFFIRMED.

Senior Judge LEONARD and Judge RIVES concur.

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No. 94-355

In the Supreme Court of the United States

OCTOBER TERM, 1994

TOMMY L. ROBERTSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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10 pp

QUESTION PRESENTED

Whether petitioner was denied effective assistance of counsel.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals (now called the United States Court of Appeals for the Armed Forces) (Pet. App. 1a-16a) is reported at 39 M.J. 211. The opinion of the Air Force Court of Military Review (now called the Air Force Court of Criminal Appeals) (Pet. App. 17a-29a) is reported at 34 M.J. 1206.

JURISDICTION

The judgment of the Court of Military Appeals was entered on May 31, 1994. The petition for a writ of certiorari was filed on August 26, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. V 1993).

STATEMENT

Petitioner was convicted by a general court-martial with members, of using cocaine, in violation of Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. 912a. The Air Force Court of Military Review affirmed. Pet. App. 17a-29a. The Court of Military Appeals granted review on certain issues and affirmed. *Id.* at 1a-16a.

1. Petitioner tested positive for cocaine during a urinalysis drug test and was charged with use of cocaine in violation of Article 112a, UCMJ, 10 U.S.C. 912a. At trial before a general court-martial with members, petitioner contended that he ingested the cocaine when he drank a beer in which, unbeknownst to him, his roommate had put the cocaine. The government's expert witness, Dr. Wallace, testified that in light of the amount of cocaine found in petitioner's urine, petitioner would have had to have ingested a "near fatal" amount at the time of the alleged inadvertent ingestion, 66 hours before the test. Pet. App. 3a.

Petitioner was convicted and sentenced to be discharged from the service with a bad-conduct discharge, to be confined for six months, to forfeit all pay and allowances for six months, and to be reduced to the lowest enlisted grade. Pet. App. 2a, 18a n.1. Petitioner was represented at trial by two attorneys, a civilian lawyer and a detailed military defense counsel. When the military judge asked which defense counsel would be handling petitioner's post-trial representation, the civilian defense counsel indicated that he would be handling it. *Id.* at 25a.

The staff judge advocate submitted the government's post-trial recommendations to the commander who had convened the court-martial and who had the responsi-

bility for acting on the sentence, approving it as adjudged, reducing it, or disapproving it altogether. See Pet. App. 24a-25a; Art. 60, UCMJ, 10 U.S.C. 860; R.C.M. 1107. The government attempted to serve the recommendations on both counsel, but the military lawyer refused service. Civilian counsel requested a 36-day extension of time within which to respond. While that request was denied, an eight-day extension was granted. During that period, petitioner filed a written statement of comments on the trial, but his counsel did not file anything. The staff judge advocate filed an addendum replying to petitioner's comments. Pet. App. 14a, 25a-26a. The commander approved the sentence as adjudged. *Id.* at 18a n.1.

2. Petitioner appealed, challenging two evidentiary rulings, the instructions on findings, and the effectiveness of the post-trial representation he received. Pet. App. 18a. The Air Force Court of Military Review affirmed. It found that the evidentiary rulings constituted harmless error (*id.* at 18a-24a), and that petitioner had waived any challenge to the instructions (*id.* at 24a).

With regard to petitioner's claim of ineffective assistance of counsel in violation of the Sixth Amendment, the court found that defense counsel had failed to provide competent post-trial representation. The court observed that petitioner's civilian counsel did not appear to be familiar with post-conviction procedures and that his military counsel appeared to have "quit too soon." Pet. App. 27a. The court also concluded, however, that petitioner failed to make the requisite showing that he suffered prejudice to entitle him to relief. The court pointed out that petitioner's counsel on appeal did not bring to the court's attention "what other matters he would have submitted to the convening authority, had he

been helped as he should have been," and that petitioner did not inform the court "that he instructed his counsel to prepare or submit anything." *Id.* at 28a. The court reviewed the matters that petitioner had submitted and found that "they raise nothing which would have been likely to result in any relief from the convening authority." *Ibid.* The court also "examined the entire record for legal error, factual sufficiency, and matters affecting the appropriateness of the sentence," and found nothing that "would have warranted any relief" if it had been "brought to the convening authority's attention." *Id.* at 28a-29a.

3. Petitioner sought further review by the Court of Military Appeals. That court granted review on three issues: two evidentiary rulings and petitioner's claim that the Air Force Court of Military Review erred in holding that petitioner suffered no material prejudice as a result of inadequate post-trial assistance of counsel. Pet. App. 2a-3a. The Court of Military Appeals affirmed. It agreed with the Court of Military Review that one of the evidentiary rulings constituted harmless error and it found that petitioner did not establish error with regard to the other evidentiary ruling. *Id.* at 4a-14a.

In assessing the claim of ineffective assistance, the Court of Military Appeals applied the two-prong test of *Strickland* v. *Washington*, 466 U.S. 668 (1984). The court reviewed the various actions that a military defendant's counsel can take concerning review by the convening authority and found that petitioner had not met his burden of demonstrating that counsel "did not exercise reasonable diligence in submitting post-trial matters for [petitioner]." Pet. App. 15a. It noted that under *Strickland*'s presumption of an attorney's competence, petitioner had the burden of showing that his counsel was deficient and that the deficiency prejudiced

petitioner. The court concluded that petitioner had not carried that burden. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 4-6) that he was denied effective assistance of counsel. He asserts (Pet. 5) that he was "denied assistance of counsel altogether" because counsel did not submit any post-trial or clemency matters. Accordingly, he claims that there should be a presumption of prejudice in his case.

The Court of Military Appeals and the Court of Military Review correctly rejected petitioner's claim of ineffective assistance of counsel. The two-prong test of *Strickland* v. *Washington*, 466 U.S. 668 (1984), required petitioner to demonstrate that his counsel's performance was so deficient that he was not functioning as counsel within the meaning of the Sixth Amendment, and that his counsel's deficient performance prejudiced petitioner. See also *United States* v. *Scott*, 24 M.J. 186 (C.M.A. 1987); *United States* v. *Barnard*, 32 M.J. 530 (A.F.C.M.R. 1990); *United States* v. *Moses*, 26 M.J. 980 (A.F.C.M.R. 1988); *United States* v. *McCarty*, 25 M.J. 667 (A.F.C.M.R. 1987); *United States* v. *Mansfield*, 24 M.J. 611 (A.F.C.M.R. 1987). Even at this late date, petitioner has not identified anything that should have been submitted as post-trial matters that would have made any difference in the outcome of petitioner's case. The courts below correctly concluded that petitioner has not met his burden of showing that he was prejudiced as a result of any lack of diligence by counsel in making post-trial submissions.

Petitioner attempts to recharacterize (Pet. 4-5) his claim as a claim of denial of counsel altogether, so that a presumption of prejudice applies. Petitioner was not denied counsel altogether, however; he was represented

by a civilian attorney who, he claims, rendered inadequate assistance. His case does not come within the scope of the principles set forth in *Perry* v. *Leeke*, 488 U.S. 272 (1989), and *Geders* v. *United States*, 425 U.S. 80 (1976), as he suggests (Pet. 5), because those cases concerned direct governmental interference with the right to counsel. See *Perry* v. *Leeke*, 488 U.S. at 279. No such interference is alleged in petitioner's case; rather his claim goes to the quality of the performance of the counsel who was representing him. In fact, petitioner's counsel sought and obtained an extension of time within which to file post-trial matters. Whether the failure of petitioner's counsel ultimately to submit any such matters was deficient and whether that failure prejudiced petitioner were questions for the reviewing courts to resolve under *Strickland*.

Petitioner is not assisted by *United States* v. *Spurlin*, 33 M.J. 443 (C.M.A. 1991) (Pet. 5). There, the court could not "categorically say that the [convening] authority might not have been swayed" if he had seen the post-trial submissions. 33 M.J. at 445 (quoting *United States* v. *Siders*, 15 M.J. 272, 274 (C.M.A. 1983)). Here, however, the Court of Military Review specifically reviewed the entire record and the matters submitted by petitioner and found that he raised nothing that would have been likely to warrant any relief from the convening authority. See Pet. App. 28a-29a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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